IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| WENDY BLAIR | : | CIVIL ACTION |
| v. | : | |
| REPUBLIC INSURANCE COMPANY | : | NO. 99-2436 |

**MEMORANDUM AND ORDER**

FULLAM, Sr.J. APRIL , 2000

I will attempt to summarize briefly the lengthy history of this litigation. Plaintiff Wendy Blair was injured in May 1983 when the Trailways bus in which she was riding collided with a toll booth. The bus was owned and operated by "Trailways Edwards, Inc.," a wholly-owned subsidiary of what was then known as Trailways Lines, Inc. In 1985, plaintiff brought suit in the Court of Common Pleas of Philadelphia County. She named as defendants "Edwards Trailways, Inc." and the driver of the bus. At the time of the accident, Trailways was insured under a "fronting policy" issued by Ranger Insurance Company, which in essence rendered Trailways self-insured for the first $500,000 of liability per occurrence; Trailways would provide the money to pay claims, and Ranger would act as an administrator for adjusting and defending claims. First-layer excess insurance was provided by Protective National Insurance Company (PNIC), and second-layer excess was provided by the defendant in this action, Republic

Insurance Company.

In 1987, while the state court action was pending, Trailways (known by this time as TLI, Inc.) was the subject of a bankruptcy action in Texas; plaintiff, however negotiated an agreement with Trailways in the bankruptcy court that would permit plaintiff to proceed with her Philadelphia personal injury action, with the understanding that she would not seek execution of any judgment against the property of the debtor. Plaintiff's action was initially defended by attorneys representing Ranger and Trailways. For reasons that remain mysterious, counsel in the Common Pleas Court action withdrew upon instructions from counsel for the debtor, and with the knowledge and approval of Ranger, and thereafter failed to defend either Trailways or the driver. Judgment was entered against Trailways in the amount of $1,913,330 in July 1994.

Plaintiff thereupon sued Ranger in this court, Civil Action No. 95-8025, under Pennsylvania's direct action statute, 40 Pa. Cons. Stat. Ann. §117. I granted summary judgment in favor of plaintiff and against Ranger in the amount of $526,583.51, representing the policy limits plus delay damages. Plaintiff's next step was to file suit against PNIC, at Civil Action No. 96-8438. This action was disposed of after PNIC belatedly discovered that its policy limits under the applicable excess policy had long been exhausted.

In May 1999, plaintiff filed this action against Republic, seeking to recover under the next tier of excess coverage. Now pending are the parties' cross-motions for summary judgment.

In her motion, plaintiff adds two plus two and arrives at ten. She claims to be entitled to judgment pursuant to Pennsylvania's direct action statute because it is undisputed that (1) there is a valid judgment against the insured which is entitled to *res judicata* effect; (2) the

judgment has not been satisfied because of the insolvency of the insured; (3) the primary carrier has paid up to its policy limits; (4) the first-layer excess insurer (PNIC) paid out its policy limits for the year of Blair's accident and the policy was exhausted; (5) defendant Republic is the second-layer excess carrier, and had a policy in force at the time of the accident; and therefore (6) Blair is entitled to a judgment against Republic. What plaintiff seems unable to recognize is that Republic has asserted defenses under the terms of the policy, and she does not address these in her motion. It will therefore be denied.

Those policy defenses are the subject of Republic's motion for summary judgment. The issue is a simple one: Republic asserts that the insured never gave it notice of plaintiff's claim. The policy requires that Republic be notified promptly of any claim that is likely to implicate its policy, and that a definite claim be submitted within 12 months after the insured's liability is fixed and rendered certain by judgment. There is no evidence that Republic had any knowledge of Blair's claim until October 1996 at the very earliest. Defendant also asserts the defense of the statute of limitations, arguing that the four-year limitations period for contract actions applies and that Blair's cause of action accrued when her judgment became final.

It is black-letter law that a plaintiff in a direct action stands in the shoes of the insured, and that the former is subject to any defenses the insurer could assert against the latter. The fact that plaintiff is an innocent, injured party does not mean that Republic is obligated to pay her claim-- while plaintiff's situation is unfortunate, there is no evidence that Republic itself is anything other than an innocent party. There was not, as plaintiff would have it, any obligation on the part of Republic to search out lawsuits implicating its excess policy that might be lurking in courthouses around the country. And if there is blame to be apportioned for the failure to give

notice of this claim to all of the excess carriers at the time the state court judgment became final, plaintiff must herself bear some of it.

An Order follows.

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**O R D E R**

AND NOW, this day of April, 2000, IT IS ORDERED:

1. Plaintiff's motion for summary judgment is DENIED.

2. Defendant's motion for summary judgment is GRANTED.

3. Judgment is entered in favor of defendant Republic Insurance Company and against plaintiff Wendy Blair.

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Fullam, Sr.J.